(2)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 03-1028
OCTOBER TERM 2003

RAYMOND L. MIDDLETON
Warden,

Petitioner,

v.

SALLY MARIE McNEIL
Respondent,

RESPONSE TO PETITION FOR CERTIORARI

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Attorney for Respondent

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A. This Court's opinion in *Boyde v. California*, 494 U.S. 370 (1990), Speaks Directly to the Question Presented in the Petition for Writ of Certiorari, Mandating It's Denial..

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B. We Know the Jury Paid no Attention Whatsoever to the Prosecutor's Statement as They Expressly Acquitted Sally McNeil of Voluntary Manslaughter.

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01-56565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALLY MARIE McNEIL)
)
Petitioner and Appellant,)
)
v.)
)
RAYMOND L. MIDDLETON)
Warden, Valley State Prison for)
Women, Chowchilla, California)
Respondent-Appellee.)
)

RESPONSE TO PETITION FOR REHEARING

I

THE PROSECUTION'S PASSING REFERENCE TO VOLUNTARY MANSLAUGHTER AND IMPERFECT SELF DEFENSE DID NOT ERASE THE PATENTLY ERRONEOUS DEFINITION OF IMMINENT HARM GIVEN TO THE JURY IN WRITING AND ORALLY BY THE TRIAL JUDGE.

A. This Court's opinion in *Boyde v. California*, 494 U.S. 370 (1990), Speaks Directly to the Question Presented in the Petition for Writ of Certiorari, Mandating It's Denial.

The jury was given an unambiguously erroneous definition of

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"Imminent Harm" in written and oral instructions by the trial judge. This was conceded by the California Court of Appeal (CCA) (See page 68 of Pet. for Cert.). In no way could the prosecutor's passing reference to Voluntary Manslaughter as a lesser included offense ***erase*** this erroneous definition of imminent harm. This is especially so in view of the jury instruction telling the jury that it was the ***judge*** and not the attorneys who were the lawgivers in this case. That of course is also the reason for the statement by this Court in ***Boyde, supra,*** that what the judge says carries much more weight with the jury than arguments of counsel and the judge's instructions to the jury are "viewed as definitive and binding statements of the law." (494 U.S. at 384.)

The Petition must be denied on this basis alone.

B. We Know the Jury Paid no Attention Whatsoever to the Prosecutor's Statement as They Expressly Acquitted Sally McNeil of Voluntary Manslaughter.

The prosecutor told the jury the crime was lessened to voluntary manslaughter if they believed she unreasonably feared here husband and needed to defend herself with force. (Pet. For Cert at App. C at p.69.) The jury proceeded to actively ***acquit*** McNeil of voluntary manslaughter. If they

had heard, understood and applied the prosecutor's argument, they would either have found her a) guilty of voluntary manslaughter or b) found that the lesser offense did not apply at all and left the verdict form for voluntary manslaughter blank. They did neither, therefore sending a strong message that they paid no attention whatsoever to the passing reference by the prosecutor in argument on which the petition for certiorari is so heavily dependent. The Ninth Circuit opinion is absolutely correct that the jury likely followed the instructions of the judge and did not heed the passing reference by the prosecutor. (Pet for Cert App. A at p. 22) The petition should be denied.

II

THE JURY WAS ADDITIONALLY ERRONEOUSLY TOLD NOT TO USE ANY OF THE BATTERED WOMEN'S TESTIMONY TO ACQUIT MCNEIL ALTOGETHER.

The petition is totally silent about a second instructional error conceded by the CCA to have occurred. (See Pet. for Cert. App. A at pp.9-10.) The jury was ordered in writing and orally not to consider any of the extensive BWS testimony as it applied to perfect self-defense. Sally McNeil's defense was eviscerated by this erroneous instruction coupled with the erroneous definition of imminent harm previously discussed.

The petition should be denied for this reason alone.

III

THE TRIAL JUDGE ERRONEOUSLY AND UNCONSTITUTIONALLY EXCISED ANY MENTION OF THE TERM 'MALICE' FROM THE JURY INSTRUCTIONS, PROVIDING AN ADDITIONAL REASON TO DENY THE PETITION.

In a third error, not granted as part of the Certificate of Appealability, the trial court purposefully excised the term 'Malice' from every jury instruction including its definition. It is submitted that had Sally McNeil not prevailed in the Ninth Circuit, this failure to grant a COA as to excising Malice, an element of the crime, from the jury instructions would have been raised by a petition for certiorari. Since that step was unnecessary it is brought to this Court's attention as a further reason to deny Warden Middleton's Petition for Certiorari.

CONCLUSION

The Ninth Circuit correctly decided that a prosecutor's passing reference to unreasonable fear of harm in his summation did not correct the trial judges erroneous definition of imminent fear as being gauged through the eyes of a reasonable person. Because of the gravity of this error and that of the jury instruction limiting use of BWS evidence as they impacted the constitutional right of Sally McNeil to present a defense to the charge, the petition must be denied. Additionally, excision of the term malice from all the jury instructions is an underlying fatal error in this case which would have to be examined if certiorari were granted. Accordingly, the petition should be denied.

Respectfully submitted,

Charles R. Khoury Jr.
Attorney for Sally McNeil

TOTAL P.24